United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1334

In the

United States Court of Appeals

FOR THE SECOND CIRCUIT

B 9/5

UNITED STATES OF AMERICA,

against

CHARLES S. CHRISTOPHER,

Appellant.

On Appeal from the United States District Court for the Southern District of New York

JOINT BRIEF AND ARGUMENT ON BEHALF OF CHARLES S. CHRISTOPHER

FRANK S. WRIGHT
1200 Main St.
Penthouse, Main Tower Bldg.
Dallas, Texas 75202

Attorney for Charles S. Christopher

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

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Statues and Rules

In The

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UNITED STATES OF AMERICA,

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v.

CHARLES S. CHRISTOPHER,

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Appeal from the United States District Court
For the Southern District of New York

JOINT BRIEF AND ARGUMENT FOR CHARLES S. CHRISTOPHER

NATURE OF THE CASE:

This is an appeal properly perfected from a Judgment and Probation/Commitment Order entered June 29, 1976, in the United States District Court for the Southern District of New York; Honorable Thomas P. Griesa presiding. Following a plea of guilty entered on April 27, 1976, Mr. Christopher, Appellant-Defendant, had imposition of sentence suspended and was placed on probation for a period of two (2) years and fined $10,000.00. Mr. Christopher's plea of guilty was accepted as to Count 5 of an

indictment charging that he unlawfully, wilfully and knowingly procured another person to use and endeavor to use an electronic device to intercept private and protected oral communications in violation of Title 18, United States Code, Sections 2511(1)(b)(ii), (iv)(A) and (iv)(B).

ISSUES PRESENTED:

1. The Trial Court committed reversible error in denying that Charles S. Christopher had standing to contest the search of Room 1332 of the Plaza Hotel.

2. The Trial Court committed reversible error by failing to conduct a pretrial hearing prior to its ruling on the motions of the defendants.

3. The Trial Court committed reversible error in holding admissible the evidence seized during a search of Room 1332 of the Plaza Hotel.

STATEMENT OF THE CASE

Charles S. Christopher and Richard Geyer were jointly indicted in a seven count indictment filed on August 27, 1975, in the United States District Court for the Southern District of New York. (R 1).[1] The first count of the indictment alleged a conspiracy, in violation of Title 18, United States Code, Section 371, to violate the federal Wiretap Law contained in Title 18, United States Code, Section 2511. The remaining counts allege individual violations of Title 18, United States Code, Section

[1] References to items contained in the record but not in the appendix will be made by the designation "R". References to items contained within the appendix will be made by the designation "A".

2511. The counts pertinent to Mr. Christopher were Counts 1, 2 and 5.

On March 18, 1975, John Buckley, Criminal Investigator for the United States Attorney for the Southern District of New York, received a telephone communication from a confidential informant. (A 21). Based upon the information received from the informant, Mr. Buckley was issued a search warrant to search Room 1332 of the Plaza Hotel at approximately 5:30 p.m. that same day. (A 22). Prior to that time, FBI Agent, Robert Scigalski went to the Plaza Hotel and set up surveillance on Room 1332 from Room 1335, across the hall. (A 24).

While keeping Room 1332 under surveillance, Agent Scigalski was informed that the search warrant had been issued. (A 25). Subsequent to receiving this information, Agent Scigalski and other FBI agents arrested a party, Dale Tolbert, they had observed leaving Room 1332 and had then returned. The arrest took place outside the room in the open doorway. (A 25). Agent Scigalski then went in Room 1332 and arrested Richard Geyer. (A 25). When arresting Richard Geyer, Agent Scigalski observed electronic equipment on top of furniture and then, upon opening a closet, observed additional electronic equipment in the closet. (A 26, 16).

The search warrant was later delivered to the room in which the arrests took place. The room was thoroughly searched. (A 22, 25). Other than opening the closet door at the time of entry into the room, the FBI agent did not touch, inspect or examine any objects in Room 1332 until the actual execution of the warrant. (A 26). Included in the seizures was a group of papers on which the Government conducted handwriting analysis and tests, in order to prove that the items contained Mr. Christopher's

handwriting. (A 30). Additionally, two tape cartridges were seized containing a conversation which the Government was to claim was between Mr. Christopher and Mr. Geyer. The Government intended to introduce the conversation into evidence at trial against Mr. Christopher. (R 15, A 29).[2]

On April 27, 1976, Mr. Christopher changed his plea from not guilty to all counts of the indictment, to guilty as to Count 5 only. (A 96). Pursuant to this action on the part of Mr. Christopher, the Government agreed not to oppose a Motion to Dismiss other counts pertinent to Mr. Christopher. (A 47). Further, Mr. Christopher retained the right to appeal the rulings on any pretrial motions made by the Court. (A 48). The Court accepted Mr. Christopher's plea of guilty to County 5 after being fully informed of all agreements made with the Government. (A 49).

I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THAT CHARLES S. CHRISTOPHER HAD STANDING TO CONTEST THE SEARCH OF ROOM 1332 OF THE PLAZA HOTEL.[3]

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[2] Contained within the memorandum of the Government in opposition to pretrial motions of the defendants in the statement of the intent of the Government to introduce the taped conversation alleged to be that of Mr. Christopher (R 15).

[3] A defendant's right to appeal rulings by the Trial Court after the entry of a guilty plea was noted in *United States v. Mann*, 451 F2d 346 (2nd Cir. 1971), wherein the Court stated:

> It is settled law in this circuit that the point may be preserved for appeal provided the reservation is "accepted by the Court with the Government's consent." 451 F2d at 347. See also *United States v. Sapere* 531 F2d 63 (2nd Cir. 1976); *United States v. Faruolo* 506 F2d 490 (2nd Cir. 1974).

At the time that Mr. Christopher entered his plea, the Assistant United States Attorney handling the case for the Government stated that the defendants desired "to retail (sic) for appeal the power to appeal the denial of the motions they have made." (A 48). The Court, with this condition having been presented, accepted the plea of guilty as to Count 5 of the indictment entered by Mr. Christopher. (A 49).

On March 18, 1975, FBI agents made seizures of certain items contained in Room 1332 of the Plaza Hotel occupied by Mr. Geyer and one, Dale Tolbert. (A 25). Mr. Christopher was not present at the time of the search. During the search of Room 1332, the FBI agents seized certain handwritten documents which were submitted for handwriting analysis. (A 30). As a result of this analysis, the Government was apparently seeking to prove that the documents contained Mr. Christopher's handwriting. (A 30). Further, a tape cartridge was seized in Room 1332 that contained a taped conversation between Mr. Geyer and Mr. Christopher. (R. 15). This tape recording was to be used by the Government at trial as evidence of an agreement between the defendants to perform the acts constituting the basis of the indictment filed against them. (A 29).

The Trial Court ruled that Mr. Christopher did not have standing to contest the alleged illegal seizures in Mr. Geyer's hotel room. (A 43). Counsel for Mr. Christopher excepted to this ruling of the Court. (A 44). After the completion of the rulings on all defense motions, the Court accepted Mr. Christopher's plea of guilty as to Count 5 of the indictment. (A 49).

The Fourth Amendment to the United States Constitution provides for "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures . . ." *United States v. Jeffers,* 342 U.S. 48, 72 S.Ct. 93(1951). To qualify as a "person aggrieved by an unlawful search or seizure" one must have been a victim of a search or seizure. *Jones v. United States* 362 U.S. 257, 80 S.Ct. 725 (1960). Therefore, a person whose property or effects are seized as a result of an unreasonable search has standing to challenge the seizure of said property, as a "person aggrieved" by the unreasonable search

and seizure. This results regardless of whether the person was present at the time of the seizure. *United States v. Jeffers*, supra; *United States v. Banks*, 465 F.2d 1235 (5th Cir. 1972); *United States v. Eldridge*, 302 F.2d 462 (4th Cir. 1962); *United States v. Stappenback*, 61 F.2d 955 (2d Cir.1932); *Pielow v. United States*, 8 F.2d 492 (9th Cir.1925); *United States v. Lester*, 21 F.R.D. 376 (W.D. Pa. 1957) affd. 282 F2d 750 (3rd Cir.1960).

The recent opinion of the Supreme Court in *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565 (1973) dealt with the problem of standing to contest an unlawful search and seizure by co-defendants who alleged neither a possessory interest in the premises searched nor the articles seized. In *Brown*, the Court appeared to place a restrictive formulation on the requirements necessary to establish standing with regard to the seizure of objects. However, as explained in *United States v. Hunt*, 505 F.2d 931 (5th Cir. 1974), the Supreme Court recognized that the defendants "failed to allege any legitimate interest of any kind in the premises searched *or* the merchandise seized". (Emphasis Added) This statement was interpreted in *United States v. Hunt*, supra at 939 to indicate that:

> "Brown conforms to the general rule of standing, and that the Court has not rejected the language in the Fourth Amendment concerning 'papers' and 'effects'." See also *United States v. Kelly* 529 F.2d 1365 (8thCir.1976).

In *United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93 (1951) and *Pielow v. United States*, 8 F.2d 492 (9th Cir.1925); analogous fact situations are presented. In *United States v. Jeffers*, supra, the defendant had placed the seized property in the hotel room of his two aunts. A search was conducted of the aunts' hotel room which resulted in the seizure of the defendant's property. After stating that the Fourth Amendment's protection from unreasonable

searches and seizures extends to both "houses" and "effects", the Court held that the Defendant had standing to contest the search based on the fact that the defendant's property was seized.

Similarly, in *Pielow v. United States,* supra, the defendant had entrusted some books and papers to an employee, for use by the employee. The Court held that the defendant:

> ". . . lost none of his constitutional rights by entrusting the possession of his books and papers to a clerk to be posted. The constitution protects against unreasonable search and seizure, not only their 'persons' and 'houses', but the peoples 'papers' and 'effects'." 8 F.2d. at 493.

Therefore, the Defendant in *Pielow* was successful in challenging the illegal search of the clerk's premises which resulted in the seizure of the defendant's books and papers. See also *United States v. Lester,* 21 F.R.D. 376 (W.D. Pa. 1957) affd. 282 F.2d 750 (3rd Cir. 1960) and *United States v. Banks* 465 F.2d 1235 (5th. Cir. 1972).

The Government, by admission of the United States' Attorney in not disputing the statement by Mr. Christopher's Counsel, was conducting handwriting analysis on items seized in Room 1332 in preparation for introducing such evidence against Mr. Christopher at trial. (A 30). Mr. Christopher would admit that absent such conduct on the part of the Government it would be incumbent on him to assert an interest in the property seized by the Government. In this case, as in the case of the Government charging a crime that includes as an essential element of the offense charged, possession of the seized evidence, the Government's actions remove the burden from the accused. See *Brown v. United States,* supra. The Government was seeking to

use the evidence against Mr. Christopher by showing that it was created and placed on the premises, directly or indirectly, by Mr. Christopher.[4]

Unlike the situation presented in *United States v. Hunt* 505 F2d 931 (5th Cir. 1974), Mr. Christopher is not acquiring an interest in the property of a third person which was in possession of a co-defendant. In the instant case, Mr. Christopher was to be proven by the Government to be the creator and original possessor of the handwritten items. The writings were, and always would be, that of Mr. Christopher. Such an interest in the "papers and effects" seized from Room 1332 of the Plaza Hotel is sufficient to confer standing on Mr. Christopher to contest their admissibility into evidence.

Additionally, a tape cartridge was seized which contained a taped conversation between Mr. Christopher and Mr. Geyer. As stated in the Government's brief submitted to the Trial Court, "the tape recording of Christopher's voice was made by Geyer some time in advance of Geyer's arrest." (R 15). It is not argued that the taping by Mr. Geyer, a private individual at the time of the recording, was a violation of Mr. Christopher's Fourth Amendment rights. *Burdeau v. McDowell* 256 U.S. 465, 41 S.Ct. 574 (1921).

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[4] The Court is respectfully directed to the second issue presented in this brief dealing with the failure of the Trial Court to conduct a full evidentiary hearing on the defense motions as requested. Therein it is contended that the defendants met the requirements of *United States v. Culotta* 413 F2d 1343 (2nd Cir. 1969) cert.den. 396 U.S. 1019 (1970); *United States v. Purin* 486 F2d 1363 (2nd Cir. 1973); *United States v. Steinberg* 525 F2d 1126 (2nd Cir. 1975) cert.den. _____ U.S. _____ (1976); and *United States v. Dunnings* 425 F2d 836 (2nd Cir. 1969) which would require the Court to conduct an evidentiary hearing on the defense motions. Such an evidentiary hearing would allow for a more detailed factual development of the respective contentions.

It cannot be doubted that Mr. Christopher had a justifiable expectation of privacy as to the words he was speaking at the time of his conversation with Mr. Geyer. *Katz v. United States* 389 U.S. 347, 88 S.Ct. 507 (1967). Mr. Christopher ended the conversation, as anyone would, with the belief that the conversation and the words he spoke were no longer in existence. He did not know, at least it was not shown by the Government, that he knew that his words had been recorded and would be made available to the Government at a later date. The Fourth Amendment protects a person's private conversations as well as his private premises. *Alderman v. United States* 394 U.S. 165, 89 S.Ct. 961 (1969). In *Alderman*, The Court stated:

> Any petitioner would be entitled to the suppression of Government evidence originating in electronic surveillance violative of his own Fourth Amendment right to be free of unreasonable searches and seizures. Such violation would occur if the United States unlawfully overheard conversations occurring on his premises, whether or not he was present or participated in those conversations. 394 U.S. at 176, 89 S.Ct. at 968.

There was no limitation stated in *Alderman v. United States*, supra, on the method in which the "United States overheard conversations of a petitioner himself." Nor are a persons Fourth Amendment rights limited to viewing or seizing tangible property. *Alderman v. United States*, supra.

In the instant case, the seizure of a recording of a conversation of Mr. Christopher is equivalent to a direct wiretap placed by the Government which produces a seizure of the conversation. Therefore, Mr. Christopher's expectation of privacy in the original conversation would give him standing to contest the admissibility at trial of the evidence seized from Room 1332 of the Plaza Hotel.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CONDUCT A PRETRIAL HEARING PRIOR TO ITS RULING ON THE MOTIONS OF THE DEFENDANTS.[5]

On September 26, 1975, a pretrial conference was conducted by the Honorable Thomas P. Griesa, at which time a timetable for the filing of motions was established. (A 1, 2). During that conference, both the Assistant United States Attorney and Counsel for co-defendant Richard Geyer, discussed, the need for an evidentiary hearing "on the suppression point prior to trial". (A 2).

Mr. Christopher filed a Motion for Pretrial Hearing which specifically requested a hearing in advance of trial upon the merits on all pretrial motions in order to promote a fair and expenditious resolution of the cause of action. (A 3). This motion was apparently denied without prejudice at a pretrial conference held on January 26, 1976. (A 28-29). At that same conference, the issue of holding a pretrial evidentiary hearing on Mr. Christopher's and Mr. Geyer's Motions to Suppress was again discussed. (A 28-34). The Government's position was that no pretrial hearing was necessary due to the fact that no defendants alleged a version of facts that would entitle him to relief under the law. (A 30-31). The conference terminated with a request by Mr. Christopher's Counsel that a pretrial hearing be held on the suppression motions. (A 34). The Honorable Judge Griesa responded by the indefinite ruling of "we will see about that." (A 34).

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[5] See footnote 3, supra.

Subsequent to the January 26, 1976 conference and prior to the date set for trial, Mr. Christopher's counsel again reurged, by letter to the Honorable Judge Griesa, the prior motion filed requesting that an evidentiary hearing be held to present certain factual testimony in regard to the defense motions. (A 35). In response to this letter, the Assistant United States Attorney agreed, in a letter addressed to the Honorable Judge Griesa, that the defense motions be resolved prior to trial; but, again, stated opposition to an evidentiary hearing. (A 36). Counsel for Mr. Geyer, also in a letter to the Honorable Judge Griesa, presented an additional request for a full evidentiary hearing on defense motions. (A 38).

On April 27, 1976, in the Honorable Judge Griesa's robing room, a third pretrial conference was held. (A 41-45). At that time the Honorable Judge Griesa stated that he had been prepared to have a brief hearing before trial on the motions, but instead was now prepared to rule on each motion then on file. (A 41). Rulings on each of the defendant's motions were then made, all of which, except one, were adverse to the defendants. (A 41-44).

After repeated requests for a pretrial hearing on motions filed by the defendants, the Trial Court failed to grant an evidentiary hearing before ruling on the motions. The requests were both in the form of a motion, oral requests and letters addressed to the Court by the defendants' counsels. (A 3, 2, 34, 35, 48). The Government's contention that no pretrial hearing was required was based upon the case of *United States v. Culotta*, 413 F2d 1343 (2nd Cir. 1969) cert.den. 396 U.S. 1019 (1970) (A 30). In *Culotta* it was held that an evidentiary hearing is not required if a defendant's moving papers "(do) not state sufficient facts which,

if proven, would have required the granting of relief requested" by a defendant.[6] 413 F2d at 1345. See also *Grant v. United States* 282 F2d 165 (2nd Cir.1960); *United States v. Thornton* 454 F2d. 957 (D.C.Cir.1971); and *United States v. Purin* 486 F2d 1363 (2nd Cir.1973).

A completely sufficient showing of facts, was made by the defendants in their moving papers. Mr. Christopher's Motion to Suppress Evidence Seized Pursuant to a Search Warrant stated:

> That certain statements contained in the affidavit of John Buckley, specifically:
>
> > "While present in Room 1334, the informant heard 'feedback' through the panasonic radio receiver situated on the table in Room 1332 indicating that an electronic, mechanical or other device designed to intercept communications was already in place and operating. Informant stated that the 'feedback' was coming through the receiver from Room 1334."
>
> are false and are material to the establishment of probable cause for the issuance of said search warrant. (A 5).

Further, the motion and accompanying affidavit of Mr. Geyer's counsel directly controverts the affidavit of FBI Agent, Robert Scigalski as to the facts surrounding the search of Room 1332 of the Plaza Hotel. (A 13, 26).[7] These two motions contain satisfactory factual averrments, which, if proven, would require the suppression of evidence seized from Room 1332 of the Plaza Hotel.

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[6] This holding apparently is a limitation on the requirement of Fed. R. Crim. P. 41(e) (1976) which states:

> . . . The Judge shall receive evidence on any issue of fact necessary to the decision of the Motion . . .

[7] Mr. Christopher filed a motion to adopt co-defendant's pleadings on January 28, 1976. (R 9). The same motion was reurged and granted by the Trial Court. (A 44).

As regards the issue of Mr. Christopher's standing to contest the seizure made by the Government, the Government alleged that a tape cartridge seized during the search of Room 1332 of the Plaza Hotel contained a conversation between Mr. Christopher and Mr. Geyer. (R 15). Additionally, the Government did not contradict the assertion of Mr. Christopher's counsel, at a pretrial conference discussion of the Motion to Suppress, that the Government was seeking to prove that Mr. Christopher's writings were contained in a group of papers seized from Room 1332 of the Plaza Hotel. (A 30). Factual allegations such as those deliniated above, are overshelming when compared to the vague allegation which the Court in *United States v. Culotta*, supra, held to be insufficient to require an evidentiary hearing.[8]

An additional basis for requiring the Trial Court to conduct an evidentiary hearing exists. As previously set fourth, Mr. Christopher's Motion to Suppress Evidence Seized Pursuant to a Search Warrant alleged that a material misrepresentation was contained in the affidavit for search warrant sworn to by Mr. John Buckley. (A 5, 19-20). In *United States v. Dunnings* 425 F2d 836 (2nd Cir. 1969) cert.den. 397 U.S. 1002 (1970) the Court stated that:

> Circumstances might arise where a hearing with respect to the truth of a legally sufficient affidavit should be granted . . . but, for reasons well indicated by Judge Frankel in

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[8] The Defendant in *United States v. Culotta*, supra, alleged in his Motion to Suppress that:

> On July 23, 1966, in the Village of Greenwood Lake, New York, I was arrested by local police officers. The officers showed me no search or arrest warrant, and I believe that my arrest was without probable cause and illegal.

For similarly barren facts situations which did not require the Trial Court to conduct an evidentiary hearing, see *United States v. Purin*, supra, and *United States v. Thornton*, supra.

> *United States v. Hasley*, 257 F.Supp.1002, 1004-1006 (S.D.N.Y.1966) that should be done only when there has been an initial showing of falsehood or other imposition on the magistrate. 425 F2d at 840.

see also *United States v. Steinberg* 525 F2d 1126 (2nd Cir.1975) cert.den. _____ U.S. _____ (1976).

A falsehood is shown on the face of the affidavit. The affidavit states that Mr. Buckley's informant had told Mr. Buckley that he had been in Room 1334 and heard feedback coming through a receiver from Room 1334. (A 20). The room number 1334 is used twice during the course of the affidavit. Further, the use of the room number 1334 is in such a way that all of the statements are logical. A magistrate reviewing such an affidavit would be led to the conclusion that the informant was in the room which was being monitored and by hearing feedback knew operational equipment was installed.[9] Such allegations would certainly be material to a finding of probable cause to issue a search warrant for Room 1332, the room allegedly containing the monitoring equipment. It could not be rationally argued that such allegations were inadvertent.

The failure of the Trial Court to conduct an evidentiary hearing on the defendant's Motion to Suppress Evidence prevented the defendants from getting an opportunity to fully and fairly litigate their Fourth Amendment Claims.[10] Such a denial on the part of the Trial Court produced a plea of guilty based upon a superficial ruling on the suppression point. Without the benefit of a full evidentiary hearing, the Trial Court could not adequately assess the validity of the defendants' motions. A guilty plea following a

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[9] The testimony of Mr. Geyer at the sentencing hearing proves the falsity of the allegation that the informant was in Room 1334 (A 56).

[10] Cf *Stone v. Powell U.S.*, 96 S. Ct. 3037 (1976); *Townsend v. Sain* 372 U.S. 293, 83 S. Ct. 745 (1963).

ruling of this nature resulted in a conviction based on a fear that unconstitutionally obtained evidence would be used at trial.[11] Therefore, the failure of the Trial Court to conduct a full evidentiary hearing constitutes reversible error and the cause should be reversed and remanded to the District Court so that Mr. Christopher's Fourth Amendments Claims can be fully and fairly litigated.

III.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN HOLDING ADMISSIBLE THE EVIDENCE SEIZED DURING A SEARCH OF ROOM 1332 OF THE PLAZA HOTEL.[12]

On March 18, 1975, FBI agents were maintaining surveillance of Room 1332 in the Plaza Hotel from a room across the hall. (A 24-25). After receiving word that a search warrant had been issued to search Room 1332, but before it arrived at the hotel, FBI agents arrested a man entering Room 1332 and Mr. Geyer, who was sitting in the room. (A 25). The agents initially observed some electronic devices on top of furniture located in Room 1332. Upon opening a closet door in the room, they also observed some electronic equipment set up in the closet. (A 26). Only after receiving the search warrant did the agents conduct a full scale search of the room. (A 25-26).

Mr. Christopher and Mr. Geyer each filed Motions to Suppress the Evidence Seized during the above described search. (A 4-6, 12-13). Both motions were denied without an evidentiary hearing by the Trial Court. (A 42, 44).

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[11] See *Commonwealth of Pennsylvania v. Claudy* 350 U.S. 116, 76 S.Ct. 223 (1956); *United States v. La Vallee* 318 F2d 499 (2nd Cir. 1963); *United States ex. rel. Ross v. McMann* 409 F2d 1016 (2nd Cir. 1969).

[12] See footnote 3, supra.

The observations by agents after the arrest of Mr. Geyer are not contested by Mr. Christopher. The seizures made pursuant to a search conducted under the authority of the warrant issued are the basis of this issue on appeal. As previously set forth, the affidavit for search warrant sworn out by Mr. Buckley contained material misstatements.[13]

The Supreme Court of the United States has never passed directly on the question of whether the validity of allegations contained in a search warrant affidavit may be attacked, but in *Rugendorf v. United States,* 376 U.S. 528, 84 S.Ct. 825 (1964) the Court impliedly approved such a procedure. Prior to this approval, The United States District Court for the Northern District of New York, in *United States v. Nagle,* 34 F.2d 952 (N.D. N.Y. 1929), dealt with a search warrant which supported a search for illegal liquor. In reviewing the statements contained in the affidavit, the Court stated:

> "Of course, if the defendant presents proof that the premises were closed at the time of the alleged sale, or that they were vacant and that the defendant did not move in until after the time of the alleged sale, or any other testimony which satisfies the commissioner that the prohibition *agent was mistaken, or made a false affidavit,* it would be the duty of the commissioner to vacate the search warrant." (Emphasis Added)

Subsequent cases have followed the statement in *United States v. Nagle,* supra, and have held that false statements contained in the affidavit supporting a search warrant invalidated the search warrant. *United States v. Suarez,* 380 F.2d 713 (2d Cir. 1967); *United States v. Botsch,* 364 F.2d 542 (2d Cir. 1966); *United States*

[13] The Court is respectfully requested to refer to the argument and authorities contained in Section II dealing with the failure of the Trial Court to conduct a pretrial hearing prior to ruling on the defendant's motions.

v. Pearce, 275 F.2d 318 (7th Cir.1960). As observed by Judge Hays in *United States v. Freeman,* 358 F.2d 459 (2d Cir.1966), "such a procedure would diminish the danger of a warrant issuing on an officer's good faith misjudgment . . . . as well as dangers of police laxity or bad faith".

While recognizing that such a procedure is allowable, a split of authority has developed as to the standard to be used to determine if a false statement invalidates the search warrant. Representative of the two basically similar standards developed are *United States v. Thomas,* 489 F.2d 664 (5th Cir.1973) and *United States v. Carmichael,* 489 F.2d 983 (7th Cir.1973). In *Thomas,* the Fifth Circuit Court of Appeals stated the applicable standard to be that:

> "Affidavits containing misrepresentations are invalid if the error (1) was committed with an intent to deceive the magistrate, whether or not the error is material to the showing of probable cause; or (2) made non-intentionally, but the erroneous statement is material to the establishment of probable cause for the search."

In *Carmichael,* supra, the Seventh Circuit Court of Appeals stated the applicable standard to be that:

> "Evidence should not be suppressed unless the Trial Court finds that the government agent was either recklessly or intentionally untruthful . . . even where the officer is reckless, if the misrepresentation in inmaterial, it did not affect the issuance of the warrant and there is no justification for suppressing the evidence . . . however, we conclude that if deliberate government perjury should ever be shown, the Court need not inquire as to the materiality of the perjury. The fullest deterent sanctions of the exclusionary rule should be applied to such serious and deliverate government wrongdoing."

The Second Circuit has not yet determined the standard which

will be used in determining whether or not a misstatement contained in a search warrant affidavit will invalidate the search warrant. In *United States v. Gonzalez*, 488 F.2d 833 (2d Cir. 1973) the court reviewed the two basic standards set forth above and then turned its attention to prior case law by stating:

> "In *United States v. Bozza*, 365 F.2d 206, 223-224 (2d Cir. 1966), the Court appeared to say that a negligent misstatement would uphold a warrant only if that misstatement was material . . . in *United States v. Suarez*, 380 F.2d 713, 716 (2d Cir. 1967), the Court stated in dicta that "(I)t may be that testimony at trial could so clearly demolish statements in an affidavit supporting a warrant, that a prior denial of a Motion to Suppress would be overruled". In *United States v. Sultan*, 463 F.2d 1066, 1070 (2d Cir. 1972), the Court suggested that a material and knowing misstatement would upset a warrant."

In *United States v. Gonzalez*, supra, the Court determined only that materiality was a critical issue. The Court avoided articulation of a complete standard by finding the misstatement immaterial to establishing probable cause upon which to base the issuance of the search warrant. However, the Court impliedly approved the "stricter test" as stated in *United States v. Thomas*, supra.

The misstatement contained in the instant affidavit would invalidate the search warrant under either of the above stated standards. Contained in the "rider to affidavit for search warrant-Room 1332, Plaza Hotel, 59th St. and Fifth Ave., NYC" is the statement:

> "While present in Room 1334, the informant heard 'feed-back' through the panasonic radio-receiver situated on the table in Room 1332 indicating that an electronic, mechanical or other device deisgned to intercept communications was already in place and operating. Informant stated that the

'feed-back' was coming through the receiver from Room 1334". (A 20)

The use of Room 1334 in the affidavit in two separate sentences makes the affidavit read as if the informant had gone into Room 1334 and made a determination from there that electronic monitoring equipment was prepared to monitor conversations in Room 1334 from Room 1332.[14] This is undoubtedly a material averrment in the affidavit and under *United States v. Gonzalez,* supra, and *United States v. Thomas,* supra, requires that the warrant be held invalid.

Further, the search warrant itself is directed to "Room 1334, Plaza Hotel, 59th St. and 5th Ave., New York, N.Y." (A 17). Using this warrant, FBI agent had no right to conduct a search of Room 1332 of the Plaza Hotel.[15]. Under the Fourth Amendment to the United States Constitution, a search warrant sufficiently describes the place to be searched if "the officer with a search warrant can, with reasonable effort ascertain and identify the

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[14] As set forth in Section II of this joint brief and argument, the Trial Court's denial of an evidentiary hearing on the motions presented by the defense prevented a more detailed factual development.

[15] This ground for suppressing the evidence seized during a search of Room 1332 of the Plaza Hotel was not originally raised in Mr. Christopher's or Mr. Geyer's pretrial motions. It is here urged under Fed.R.Crim.P. 52(b) 1976 which states:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

The search of Room 1332 produced evidence of a highly incriminating nature. The entry of this evidence in trial against Mr. Christopher, after an illegally conducted search, would seriously affect the fairness, integrity and public reputation of judicial proceedings. This ground for suppression should be considered as "plain error." But Cf. *United States v. Del Llano* 354 F. 2d 844 (2nd Cir.1965); *United States v. Indiviglio* 352 F2d 276 (2nd Cir.1965) cert.den. 383 U.S. 907 (1966).

place intended." *Steele v. United States* 267 U.S. 498, 45 S.Ct. 414 (1925).[16] In a multi-unit hotel the size of the Plaza Hotel in New York, the identification of a specific room is absolutely necessary. In *United States v. Kaye* 432 F2d 647 (D.C. Cir. 1970) a closely analogous fact situation was presented. In *Kaye*, the police officers had a warrant which authorized a search of "the premises known as 3618 14th Street N.W." The Court held that the warrant did not authorize a search of an upstairs apartment in the same building with the address of 3618½ 14th Street N.W. As stated by the Court:

> It is the description in the search warrant, not the language of the affidavit, which determines the place to be searched. 432 F2d at 649.

See also *United States v. Bermudez* 526 F2d 89 (2nd Cir. 1975).

Therefore, even though the affidavit of Mr. Buckley contains descriptions of a different location, the search warrant only authorized a search of Room 1334 of the Plaza Hotel. The search of Room 1332 under the search warrant for Room 1334 was invalid and requires suppression of the evidence seized pursuant to the search.

Without the authority of a search warrant for Room 1332, the FBI could not validly seize papers containing handwritten material or a tape cartridge.[17] As stated by the Supreme Court in *Coolidge v. New Hampshire* 403 U.S. 443, 91 S.Ct. 2022 (1971:

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[16] See also Fed.R.Crim.P 41(c)(1976) which states inpertinent part:

> If the Federal Magistrate or State Judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

[17] Again the record is sparce as to specific facts surrounding the search of Room 1332. The Court is respectfully asked to refer to Section II of this joint brief and argument.

> . . . an object that comes into view during a search incident to arrest that is appropriately limited in scope under existing law may be seized without a warrant . . . what the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. 403 U.S. at 465-466, 91 S.Ct. at 2038.

In *Stanley v. Georgia* 394 U.S. 557, 89 S.Ct. 1243 (1969), the plurality opinion of Mr. Justice Stewart held that the seizure of a film which had to be viewed to determine its true nature was not criminal evidence in plain view. The same reasoning would apply to the tape cartridge seized in the instant case.

FBI Agent Robert Scigalski stated in an affidavit that, upon arresting Mr. Geyer, he observed some electronic devices on the top of some furniture and electronic materials in a closet. (A 26). He further stated that he did not touch, inspect, or examine any of the objects in Room 1332 until the actual execution of the search warrant. (A 26). It is apparent that, if the initial search incident to arrest, pursuant to *Chimel v. California* 395 U.S. 752, 89 S.Ct. 2034 (1969) had revealed anything subject to seizure, there would have been no necessity to wait for a warrant. As stated in *Chimel v. California,* supra, after holding that a search of the area within the immediate control of the arrestee was justified:

> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well recognized, exceptions, may be made only under the authority of a search warrant. 395 U.S. at 763, 89 S.Ct. at 2040.

The sparce record before the Court prevents the search from being upheld. Without a valid search warrant, the search is per se unreasonable under the Fourth Amendment, subject to only a few specially established and well-delineated exceptions. *Coolidge v. New Hampshire,* supra. The burden is upon those seeking the exemption to show the need for it. *United States v. Jeffers* 342 U.S. 48, 72 S.Ct. 93 (1951). Therefore the papers allegedly containing the handwriting of Mr. Christopher and the tape cartridge containing a conversation between Mr. Christopher and Mr. Geyer should have been suppressed from introduction into evidence against Mr. Christopher.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Charles S. Christopher prays that the conviction should be reversed and remanded.

Respectfully submitted,

FRANK S. WRIGHT 651-9561
Penthouse; Main Tower Building
1200 Main Street
Dallas, Texas 75202

Attorney For Charles S. Christopher

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing joint brief and argument for Charles S. Christopher has been served upon Honorable Robert B. Fiske, Jr., United States Attorney and Frederick T. Davis, Assistant United States Attorney, at the United States Courthouse, Annex, One St. Andrew's Plaza, New York, N.Y. 10007

Frank S. Wright

Frank S. Wright